

To: NACWA SSI Advocacy Coalition
From: National Office
Date: November 4, 2013
Subject: PROPOSED SSI ADVOCACY PLAN & FUNDING REQUEST

This memo provides a proposed advocacy plan for continued NACWA work on sewage sludge incinerator (SSI) issues on behalf of the Association's Sewage Sludge Incineration Advocacy Coalition (SSIAC). Additionally, this memo outlines a proposed funding request for additional financial contributions from SSIAC participants to continue NACWA's advocacy on this issue. **After reviewing this memo, SSIAC members are asked to please email Nathan Gardner-Andrews at ngardner-andrews@nacwa.org and indicate whether or not they plan to continue participation in the SSIAC by November 20, 2013.**

NACWA is proposing a new action plan for the SSIAC that combines both continued advocacy efforts against the current SSI regulations with implementation assistance to meet the existing SSI Rule compliance deadlines. The specific actions NACWA proposes are as follows:

- Submit an administrative petition to EPA asking the Agency to administratively stay the current March 2016 SSI Rule compliance deadline until EPA's remand revisions to the rule are complete.
- Continue NACWA's legal challenge to EPA's Non-Hazardous Secondary Materials (NHSM) Rule.
- Engage with EPA during the rule remand process.
- Provide implementation assistance to SSIAC participants to meet existing compliance deadlines.

NACWA is also proposing a new funding request to determine which current SSIAC utilities are interested in staying part of the coalition going forward and providing additional financial resources to support the planned advocacy actions. Depending on the number of SSIAC participants that commit to continued involvement, the anticipated cost to maintain participation in the SSIAC will be between \$1,000 and \$2,500 per permitted SSI unit operated by your utility. The more SSIAC utilities that continue participation in the coalition, the lower the per unit cost will be. NACWA is hopeful the vast majority of current SSIAC members will choose to continue collaborating and pooling resources with their fellow SSI utilities on this critical advocacy initiative by maintaining participation in the coalition.

Additional details on the advocacy plan and funding request are outlined below.

In order to further discuss this proposal and answer any questions SSIAC members may have, we have scheduled a conference call for Thursday, November 14 at 2:00 PM ET/11:00 AM PT. Further details regarding the call will be sent via email. Additionally, any questions or comments regarding information contained in this memo may be submitted via email to Nathan Gardner-Andrews at ngardner-andrews@nacwa.org or Chris Hornback at chornback@nacwa.org.

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Background Information

NACWA formed the SSIAC in March 2011 to fund a comprehensive advocacy challenge to EPA's new SSI regulations. The primary focus of the SSIAC's efforts was to file a legal and administrative challenge to the SSI Rule. Additionally, the SSIAC was to support a legal challenge to EPA's NHSM Rule (also known as the "solid waste rule" and which provided a key regulatory foundation for the SSI Rule) and explore possible legislative advocacy efforts with Congress to address concerns with the SSI Rule.

All clean water utilities nationwide operating SSI units – including both NACWA members and non-members – were invited to join the SSIAC. A total of 45 utilities from around the country joined the SSIAC, and collectively these utilities operate approximately 100 permitted SSI units. Participation in the SSIAC was based on a contribution of \$5,000 per permitted SSI unit, and collectively the utilities in the coalition were able to pool their resources and raise approximately \$500,000 to fund a sustained SSI advocacy effort that has lasted over two-and-a-half years.

Acting on behalf of the SSIAC, NACWA filed a formal legal challenge to the SSI Rule with the D.C. Circuit in May 2011, a parallel administrative petition with EPA requesting reconsideration of the rule in May 2011, and a formal legal challenge to the NHSM Rule in June 2011. EPA denied NACWA's administrative reconsideration request in April 2012, and NACWA incorporated a challenge to this denial into its overall lawsuit against the SSI Rule. NACWA engaged in briefing on the SSI Rule legal challenge from July through December 2012, and oral arguments in the case were heard in May 2013.

The court issued a decision in August upholding EPA's statutory authority for the rule but remanding significant portions of the rule back to EPA for additional consideration and revisions on a number of key technical issues. The court indicated that many of EPA's technical justifications in the rule are not legally adequate, and therefore EPA must go back and provide additional explanations for the emissions limits in the SSI Rule or develop new emission limits entirely. However, the court did not vacate the underlying rule during the remand process, nor did the court set a deadline for EPA to complete the remand. Accordingly, the rule's compliance deadline of no later than March 2016 for existing SSI units remains in full effect. Additional details and analysis regarding the court's decision has previously been provided to SSIAC utilities.

Litigation over the NSHM Rule was temporarily halted between November 2011 and May 2013 while EPA made revisions to the rule. A final, revised version of the rule was released by EPA in early 2013 without any changes to its regulation of biosolids as a solid waste when combusted, and new challenges to the rule were filed by NACWA and others during the Spring and Summer of 2013. The parties to the litigation, which include multiple other organizations and trade groups challenging the rule in addition to NACWA, are currently negotiating a briefing schedule. Briefing is expected to occur in early 2014, with the possibility for a decision in the case by late 2014.

Proposed Advocacy Plan

Shortly after the D.C. Circuit's August decision in the SSI case, NACWA sent a survey to all SSIAC participants to gather input on how NACWA should proceed with its SSI advocacy efforts in light of the legal ruling. The survey requested information on efforts by individual coalition members to achieve compliance with the SSI Rule's new emission limits, and also sought input on a number of potential advocacy efforts that NACWA could pursue as part of the SSI Rule remand process.

Based on both the results of the SSI survey and NACWA staff recommendations, NACWA is proposing a new action plan for the SSIAC that combines both continued advocacy efforts against the current SSI regulations with implementation assistance to meet the existing SSI Rule compliance deadlines. NACWA believes it is critical to strike the right balance between continued advocacy to challenge or delay the SSI regulations while at the same time ensuring SSIAC utilities are doing everything necessary to meet the March 2016 compliance date.

Accordingly, NACWA proposes to take the following specific actions on behalf of the SSIAC:

- **Administrative Petition to EPA to Stay March 2016 Compliance Deadlines** – NACWA will file an administrative petition with EPA asking the Agency to temporarily delay the current compliance deadline under the SSI Rule of March 2016 for existing SSIs until the rule remand process is complete. Although the D.C. Circuit remanded key portions of rule to EPA for potential revisions, the court did not vacate the rule or delay its compliance deadlines. Accordingly, it is possible that EPA might not complete its remand process until after the March 2016 compliance deadline. NACWA believes it is inappropriate for EPA to require compliance with emissions limits that might change during the remand, especially in light of the D.C. Circuit's decision, and thus will ask EPA to use its existing administrative authority under the Clean Air Act to stay the existing compliance deadlines until the remand process is complete.

A key focus of NACWA's argument to EPA will be that stay of the compliance date will help ensure municipal utilities do not spend valuable and limited financial resources on complying with SSI emission limits that may change as a result of the remand process. Additionally, NACWA will argue that a stay is warranted given the pending legal challenge to EPA's NHSM Rule (see below for more details). NACWA will plan to file the petition with EPA in late 2013 or early 2014 and would seek to have EPA respond to the petition as expeditiously as possible.

- **Continued Legal Challenge to NHSM Rule** – NACWA will also continue its pending legal challenge to EPA's NHSM Rule. The NHSM Rule provides a critical regulatory underpinning for the SSI Rule. In the NHSM regulations, EPA states that all biosolids are solid wastes when combusted, and that the burning of biosolids in SSIs is equivalent to discarding a waste – regardless of any energy recovery activities that may occur during the process. NACWA strongly disagrees with this position and believes EPA's blanket determination that biosolids will not be able to meet the Agency's legitimate fuel exclusion ignores existing data and will negatively impact utility efforts to pursue innovative energy recovery projects. Furthermore, NACWA disagrees with how EPA treats biosolids in the final rule in light of the existing domestic sewage exclusion found in federal solid waste laws.

NACWA's legal arguments in challenging the solid waste rule will focus on the fact that Congress never intended biosolids of any kind to be considered a solid waste, and thus EPA has no legal basis to regulate biosolids incinerated in SSIs as a solid waste. Although success in this legal challenge is far from guaranteed, a victory would provide a strong legal basis for EPA to repeal the existing SSI Rule. Briefing in the case is expected to occur in early 2014, hopefully leading to a decision by late 2014.

- **Engagement With EPA During SSI Rule Remand Process** – NACWA will work directly with EPA during the remand process to address the technical shortcomings in the rule identified by the D.C. Circuit. NACWA will work not only to provide EPA with more accurate and robust data about the nature of SSI emissions and sewage sludge – which NACWA believes could ultimately lead to more relaxed emission standards in a revised rule – but also to try and expedite EPA's remand process as

much as possible. Under a best case scenario, NACWA believes EPA could complete the remand in early to mid-2015 if the Agency moves forward in a rapid manner, and NACWA will work with EPA to try and accomplish that goal. Additionally, NACWA will work with SSIAC participants to provide EPA with appropriate data that can fix the seriously flawed technical basis for the existing SSI Rule, such as rule errors over issues such as sewage sludge variability that were identified by NACWA in our legal challenge and validated by the D.C. Circuit.

- **Assistance With Implementation to Meet Existing Compliance Deadlines** – While NACWA strongly believes the proposed actions outlined above are important and worthwhile efforts to continue aggressive advocacy on the SSI issue, *it is also imperative that all SSIAC utilities be working now in an aggressive manner towards compliance with the March 2016 compliance deadline for existing SSI units under the current rule.* This is especially true since the D.C. Circuit did not vacate the existing compliance deadlines or provide any deadline for EPA to complete its rule remand, and because the advocacy initiatives outlined above that NACWA intends to pursue have no guarantee of successfully delaying implementation deadlines or ultimately changing implementation requirements.

Accordingly, NACWA will also work over the coming months to provide enhanced implementation assistance as appropriate to SSIAC members as they work to meet the rule's existing requirements and deadlines. NACWA will seek input from SSIAC members on specific areas and issues where implementation assistance would be helpful. Additionally, NACWA will strive to serve as a "clearinghouse" for SSIAC participants to exchange information with each other about implementation issues and efforts to achieve compliance by the existing deadlines.

Proposed Funding Request

NACWA believes the proposed actions outlined above provide the best opportunity to build on the SSIAC's existing advocacy efforts and the partial legal victory from the D.C. Circuit, while at the same time recognizing the importance of planning aggressively now for compliance with the current March 2016 deadlines. However, the original funds raised by the SSIAC in 2011 have now been almost fully expended on the various SSI actions undertaken by NACWA to this point, and additional funds will be necessary to complete the advocacy plan outlined above.

After careful consideration and analysis of the most cost-effective way to implement the proposed advocacy plan, NACWA believes a total budget of \$100,000 is necessary to accomplish the suggested action items. This would include filing an administrative petition to EPA requesting a compliance deadline stay, continuing NACWA's partition in the NHSM lawsuit, and providing enhanced implementation assistance to SSIAC participants while also engaging EPA during the rule remand.

In order to fund this budget request, NACWA is proposing another round of voluntary contributions from utilities wishing to maintain their involvement in the SSIAC. These contributions would be based on the number of permitted SSI units operated by each utility. The suggested contribution amount would likely be somewhere between \$1,000 and \$2,500 per permitted SSI, which is substantially less than the contribution amount of \$5,000 per unit that was requested in 2011.

The actual final contribution amount within the \$1,000 – \$2,500 per unit range will ultimately be determined by how many current SSIAC utilities choose to continue their participation and make additional contributions to the SSIAC fund. For example, if the vast majority of members continue forward, the contribution amount

will be closer to the \$1,000 per unit figure. However, if only half or fewer of the current SSIAC members opt to go forward and contribute, the contribution amount will have to be higher on a per unit basis to meet the overall fundraising goal. If only a small percentage of current SSIAC participants decide to continue forward, NACWA may also have to consider a scaled-back plan of advocacy initiatives and implementation assistance.

It is NACWA's sincere hope that a significant number of current SSIAC utilities will choose to continue partnering with their fellow SSI agencies and build on the collaboration that the SSIAC has fostered over the past two-and-a-half years. Utilities that choose to maintain participation with the SSIAC will continue to receive enhanced access and information on SSI developments, NACWA's ongoing advocacy efforts, and implementation assistance. Utilities that choose not to continue with the coalition will no longer receive these enhanced benefits related to SSI issue, but will still maintain their baseline NACWA membership and continue receiving all of their standard NACWA membership benefits.

In order to finalize the proposed SSI advocacy plan and determine the resulting budgetary needs, NACWA requests that all current SSIAC members respond to this memo and indicate whether their utility is or is not interested in making an additional financial contribution to the SSIAC to maintain involvement in the coalition. SSIAC members are asked to please indicate their intent to continue participation with the SSIAC via email to Nathan Gardner-Andrews at ngardner-andrews@nacwa.org by November 20, 2013. NACWA will then follow up with those utilities wishing to continue membership with further information and an invoice for their additional financial contribution to the SSIAC.

As noted above, please do not hesitate to contact Nathan Gardner-Andrews at ngardner-andrews@nacwa.org or Chris Hornback at chornback@nacwa.org with any question regarding information in this memo or NACWA's planned path forward for SSI advocacy. NACWA greatly appreciates your participation in the SSIAC and strong support of NACWA's SSI efforts to this point, and we look forward to continued work with you on this vital and timely advocacy effort.